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**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC86144**  
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**SCOTT PONTIUS,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE, STATE OF MISSOURI,**

**Appellant.**  
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**Appeal from the Circuit Court of St. Charles County  
The Honorable Terry R. Cundiff, Judge**  
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**Appellant's Substitute Reply Brief**  
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## Argument

Pontius' brief is notable as much for what it does not say, as for what it does. First, Pontius does not advance any argument in support of the trial court's judgment and its rationale that *Sooch v. Director of Revenue*, 105 S.W.3d 546 (Mo.App., E.D. 2003), compelled a result against the Director. *Sooch* has no application to Pontius' case, the trial court misapplied the law in finding against the Director on this basis, and Pontius, tellingly, does not contend otherwise.

Also, Pontius does not address or discuss *Howard v. McNeill*, 716 S.W.2d 912 (Mo.App., E.D. 1986); *Swanberg v. Director of Revenue*, 122 S.W.3d 87 (Mo.App., S.D. 2003); or *Misener v. Director of Revenue*, 13 S.W.3d 666 (Mo.App., E.D. 2000), the cases upon which the Director has principally relied (App.Br. 8). Pontius, therefore, must not take issue with the Director's discussion and analysis of those cases, contained in her opening brief.

As to what Pontius' brief does say, his contentions are twofold. First, as to the reasonable grounds issue, the only issue in dispute (Resp.Br. 10), Pontius argues that, "[w]hen the officers responded to the scene of the collision not one witness mentioned or stated that the driver of the Pontius vehicle appeared to have any indicia of intoxication" (App.Br. 13, emphasis omitted). Factually, this is true; neither civilian witness (the two individuals in the stopped car that was hit) noted that Pontius exhibited signs of intoxication (LF 42-46). But, then again, after the collision, Pontius left the scene while one of the civilian witnesses was trying to call police on his cellular telephone (LF 18), so the opportunity for such observation

was arguably truncated due to Pontius' evasive activities. Indeed, Pontius' hasty departure would cause a reasonable, cautious, and prudent police officer to believe that Pontius was trying to avoid being detected as an intoxicated driver. *See Howard v. McNeill*, 716 S.W.2d at 915 (the fact that the driver did not go to the hospital could be seen as "possibly. . . an effort to avoid being seen by neutral observers).

In any event, however, Pontius notes the Eastern District's opinion, and argues that "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached. Rule 73.01(c)." (Resp.Br. 13, quoting *Pontius v. Director of Revenue*, No. ED83375, slip op. at 5 (Mo.App., E.D. May 11, 2004)). Of course, that is true, but just as a trial court may not find facts lacking an evidentiary basis, *see Testerman v. Director of Revenue*, 31 S.W.3d 473, 483 (Mo.App., W.D. 2000), (judgment may not be based upon conjecture or speculation), so, too, this Court may not find a "fact issue" that is "in accordance with the result reached" where the record is devoid of evidentiary support, one way or the other, as to a particular factual proposition.

Put in the context of the facts of Pontius' case, the fact that the civilian witnesses were not reported to have noted Pontius exhibiting indicia of intoxication does not prove anything. While lack of observation of intoxication indicia by civilians does not prove that Pontius was intoxicated, likewise, it does not prove that he was not, nor does it defeat the officers' reasonable grounds. It simply proves that the civilian witnesses did not report that Pontius exhibited signs of intoxication. And nothing in Pontius' cited cases suggests that Missouri law requires a specific type of evidence – *i.e.*, civilian witness reports of indicia of intoxication

– before an officer can form reasonable grounds. While such information, in the abstract, may be helpful, it is certainly not required, either legally or factually.<sup>1</sup>

For example, in *Howard v. McNeill*, the officer only knew that the driver was intoxicated when he arrested him, and that the driver had failed to go to the hospital after the crash. *Howard v. McNeill*, 716 S.W.2d at 914. At the crash scene, the officer had encountered the other driver and another civilian witness, but neither witness informed the officer of Howard’s condition – sober, intoxicated, or otherwise – at the scene of the crash, and Howard had already left the scene. *Id.* On these facts, the Missouri Court of Appeals, Eastern District, found that the officer had probable cause, notwithstanding the fact that the civilian witnesses at the crash scene did not volunteer that Howard exhibited indicia of intoxication, or otherwise opine on his condition.

Pontius’ second main contention relates to the procedural posture of his case. Pontius maintains that the Director did not meet her burden of proof, and “the trial court at the close

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<sup>1</sup> Had the civilian witnesses made such reports that Pontius now suggests are required, Pontius would likely have moved to exclude them anyway; at trial he objected to “any hearsay evidence set forth in the State’s record, especially hearsay evidence from any civilian witness not present in court to testify to it. I would move to strike any statements contained in the report from any civilian witnesses” (Tr. 2). Of course, such witness statements, that might otherwise be hearsay, are admissible to show probable cause. *Burleson v. Director of Revenue*, 92 S.W.3d 218, 221 (Mo.App., S.D.2003).

of the Director's case sustained the petition" (Resp.Br. 12). Further, in response to the Director's contention that he could have called the reporting officers as witnesses if he had a problem with their reports, Pontius argues that "[s]ince the Director did not sustain her burden and the court sustained Pontius' Petition at the close of the Director's case, there was no need to have witnesses, the officers or Pontius testify" (Resp.Br. 14-15, citing *Pontius v. Director of Revenue*, slip. op at 5).

Pontius thus argues that the trial court directed a verdict in his favor at the close of the Director's case, obviating the need for him to present any evidence or testify. But, while the record is not entirely clear, the trial court did not ask Pontius if he had any evidence to present, and Pontius certainly did not request a verdict directed in his favor (Tr. 2-8). Pontius' argument, therefore, is that the trial court should have, or did, direct a verdict in his favor *sua sponte*.

There are at least two problems with this argument. First, as a general proposition, trial courts should act *sua sponte* only in exceptional circumstances, *see generally State v. Drewel*, 835 S.W.2d 494, 498 (Mo.App., E.D. 1992), lest they cast themselves in the role of advocates, versus arbiters. Second, directed verdicts should rarely, if ever, be granted in drivers license revocation cases:

"In a trial without a jury, the judge is not only the trier of the facts but also the determinant of whether the plaintiff has shown a right to relief. It is for this reason that the motion for directed verdict, so apt in a jury case to differentiate the judge function as to

whether the evidence is submissible from the jury function to find the facts and return a verdict under the instructions of the court, has no role or function in a trial to the court without a jury.”

*Spry v. Director of Revenue*, 144 S.W.3d 362, 367 (Mo.App., S.D. 2004), *quoting City of Hamilton v. Pub. Water Supply Dist. No. 2*, 849 S.W.2d 96, 100 (Mo.App., W.D. 1993).

Missouri Supreme Court Rule 73.01(b) “authorizes a defendant to ‘move by motion for a judgment on the grounds that upon the facts and the law the plaintiff is not entitled to relief.’” *Spry v. Director of Revenue*, 144 S.W.3d at 367, *quoting* Missouri Supreme Court Rule 73.01(b). “Unlike a motion for directed verdict in a jury-tried case, a Rule 73.01(b) motion submits the case for judgment on the merits and requires the trial court to weigh the evidence and assess credibility.” *Spry v. Director of Revenue*, 144 S.W.3d at 367. “When a motion for directed verdict is inappropriately made in a court-tried case, the motion is treated as one submitting the case for a decision on the merits pursuant to Rule 73.01(b).” *Id.*

Here, therefore, Pontius basically presumes that the trial court *sua sponte* granted him a directed verdict – an action that should rarely, if ever, be taken in cases arising under § 302.311, RSMo 2000, when requested, much less *sua sponte*. Even granting Pontius this for the sake of argument, however, the standard on appeal is the familiar standard of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), since, again, even assuming Pontius made a motion under Rule 73.01(b), the court, sitting as fact finder, had to weigh credibility. *Spry v.*

*Director of Revenue*, 144 S.W.3d at 367. And under that standard, as explained in the Director's opening brief, the Director should have prevailed.

Finally, and assuming again that Pontius had a verdict directed in his favor without asking for it, the question then relates to remedy. In *Spry*, the court remanded the cause, reluctantly it seems, to allow Spry the opportunity to present evidence:

[t]his [is the] inevitable consequence of the trial court's error in sustaining a Rule 73.01(b) motion [that] vividly illustrates why such a motion should rarely, if ever, be sustained in a trial *de novo* conducted pursuant to § 302.311.

*Spry v. Director of Revenue*, 144 S.W.3d 369-370, *relying on Roberts v. Wilson*, 97 S.W.3d 487, 494 (Mo.App., W.D. 2002). Also in *Spry*, the Court of Appeals noted that, “[b]ecause of the time that has elapsed while the appeal was pending, the trial court may conduct a new trial, rather than a continuance of the prior trial, if deemed beneficial by the trial court.” *Spry v. Director of Revenue*, 144 S.W.3d at 370. That rule seems to be particularly apt here where Pontius first had a hearing before a drug court commissioner, in December, 2002 (LF 4), and then had a hearing before the circuit court, after which he successfully sought reconsideration (LF 5). Indeed, the unique procedural facts of Pontius’ case weigh heavily when considering if, in fact, Pontius “did not have an opportunity to present any rebuttal evidence,” *Spry v. Director of Revenue*, 144 S.W.3d at 369, *quoting Roberts v. Wilson*, 97 S.W.3d at 494, as Pontius now suggests was the case.

## **Conclusion**

In view of the foregoing, this Court should reverse the judgment of the trial court and remand the case with orders to reinstate the Director's revocation of Pontius' driving privileges.

Respectfully submitted,

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## **Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 5<sup>th</sup> day of November, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Gregory R. Futhey  
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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,920 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Cheryl Caponegro Nield